IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2862 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NEELAM DIPAK KHATWANI

Versus

DIPAK KANAYALAL KHATWANI

Appearance:

1. First Appeal No. 2862 of 2000

MR GJ ASRANI for Petitioner No. 1

MR WA URAIZEE for Petitioner No. 1

MR SURESH M SHAH for Respondent No. 1

MR MEHUL S SHAH for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE H.K.RATHOD

Date of decision: 20/09/2002

CAV JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. This Appeal under Section 19 of the Family Court Act is preferred by the original respondent wife against the judgment & decree dissolving the marriage in Family Suit No. 73 of 2000 (Old HMP No. 449 of 1993 of City Civil Court, Ahmedabad) by the Family Court,Ahmedabad, under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act 1955; on the ground of cruelty and desertion by the appellant wife.

2. Facts leading to the filing of the present appeal shortly stated are, that the marriage between the petitioner husband and respondent wife was solemnised at Ahmedabad on 10-9-1989 as per Hindu Marriage Rites, and after the marriage the respondent came to reside with the petitioner in the joint family; that, prior to her marriage respondent was staying with her mother and brothers at Ajmer. It is the say of the petitioner that, after the marriage respondent never settled in the matrimonial home and was quarreling with petitioner creating mental tension to the petitioner. It is further alleged that the respondent wanted the petitioner to settle at Ajmer as she wanted to stay at Ajmer or at Bombay for the purpose of permanent settlement, but as it was not possible for the petitioner to leave the service and the city of Ahmedabad he could not accede to her desire. It is the further say of the petitioner that, as the respondent did not want to stay at Ahmedabad she all the time quarreled with the petitioner as well as other inmates of his house; that the respondent went to Ajmer with her mother on 11-12-1989 and returned in the month of January 1990 as the mother of the petitioner had expired as she was informed by the petitioner about the same. After the post death ceremonies were over, the respondent started same quarrels and misbehaved with the family members and insisted to permit her to go to Ajmer. That, in the month of March 1990 he was suffering from piles and had to undergo treatment and there was perfuse bleeding and was hospitalisd, in a private nursing home for ten days; that after discharge from the hospital he was advised to take rest, but during that period instead of serving the petitioner, respondent picked up quarrels with the petitioner and his family members for going to Ajmer to stay with her mother and brothers; thus the respondent behaved in a manner cruel to the petitioner. It is the further say of the petitioner that, when respondent complained about giddiness and sickness, she was advised to have treatment from a doctor in Ahmedabad, but she did not agree to consult the doctor in Ahmedabad and insisted to go to Ajmer and left for Ajmer with her elder brother on 15-6-1990; that, thereafter several

attempts were made by the petitioner to bring respondent back to the matrimonial home but she did not return; that, respondent never tried to come back to matrimonial home to stay with the petitioner and discharge her matrimonial obligation and thus the respondent deserted the petitioner for more than two years immediately preceding the institution of Hindu Marriage Petition. It is further stated that, though the petitioner was likely to undergo surgery for piles she did not care for him and thereby caused great mental torture to the petitioner. It is alleged that, by not allowing the petitioner to enjoy marital happiness with her, as she left him, respondent has also caused physical and mental torture to the petitioner; that the petitioner served the respondent with a notice dated 30-10-1993 and the same was received by her, but she did not return to Ahmedabad. On these assertions petitioner filed the petition praying for decree for dissolution of his marriage with the respondent.

3. The respondent wife contested the petition by filing Written Statement vide exhibit-38 denying all the allegations made against her by the petitioner husband. The solemnisation of the marriage between he petitioner and respondent on 10-9-1989 at Ahmedabad according to Hindu Marriage Rites and prior to her marriage her stay with her mother and brothers at Ajmer has been admitted, and also the respondent having come to matrimonial home after her marriage and her stay with the petitioner in the joint family is also admitted. The allegations about her desire and insistence to stay at Ajmer or Bombay and thereby pressurising the petitioner to settle at Ajmer or Bombay have been denied. It is denied that she wanted to stay and settle with her brothers or sister. It is the say of the respondent that she was ill-treated by the petitioner and his parents as well as sister-in-law during her stay in the matrimonial home at Ahmedabad and that she was physically beaten by them. That the petitioner and his parents wanted more dowry from her parents, and therefore, they were not providing food and meals and she was starving; that, she was doing work for the family for the whole day & night, she was abused by the parents of the petitioner; that she went to Ajmer on 11-12-1989 for bringing more dowry from her parents, but she returned on 5-1-1990 as her mother-in-law had expired; that, at that time she had brought Rs.5,000/- and had given the same to the petitioner; that, she has always tried to help the petitioner during his illness in the hospital but she was not allowed to go to hospital by parents of the petitioner. It is also contended that she was ill-treated by parents of the petitioner and

ultimately she was compelled to leave matrimonial home on 15-6-1990; that, since then she stays at Ajmer with her mother and brothers; that the petitioner has never tried to take her back to Ahmedabad but she herself had come with her brother Harish to Ahmedabad, but the petitioner refused her entry and not allowed to live in the house. It is further contended that all the allegations made by the petitioner are false. The Family Court at Ajmer has passed an order of maintenance ofRs.400/- per month vide order dated 2-2-1994 under Section 125 of Criminal Procedure Code.

From the pleadings on record Learned trial Judge framed issues vide exhibit-40 and on appreciation of evidence Learned trial Judge granted the petition and dissolved the marriage solemnised on 10-9-1989 between the petitioner and respondent under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act. It is this decree and judgment dissolving the marriage between the appellant (original respondent) and respondent (original petitioner) which has been assailed in this appeal by the appellant wife.

4. As seen from the above, solemnisation of the marriage between the petitioner husband and respondent wife at Ahmedabad according to Hindu Marriage Rites and the respondent prior to her marriage staying with her parents at Ajmer, and after the marriage with the petitioner the respondent came to stay at Ahmedabad in the matrimonial home and stayed in joint family of the petitioner are admitted facts. It is also not disputed that the spouses parted physical company on 15-6-1990 and respondent went to her parental house at Ajmer with her brother. It is also an admitted position that during the piles ailment/sickness of the petitioner and during period of his hospitalisation and even thereafter respondent was in the matrimonial home. It is also suggested and not disputed by the petitioner that he did not undergo surgery for piles ailment after his hospitalisation of ten days for the said ailment.

5. We will first deal with the ground of desertion seeking decree for dissolution of marriage as provided under Section 13 (1) (i-b) of the Hindu Marriage Act. As far as the spouses parted physical company on 15-6-1990 is concerned, same is an admitted fact. In the petition it has been averred that the petitioner in order to avoid unpleasantness in the family, and tired of the attitude of the respondent, ultimately agreed that the respondent may go to her parents house with her elder brother and that she left for Ajmer on 15-6-1990. Before leaving on

15-6-1990 petitioner had once again requested the respondent to postpone her visit for few days as there was no family member in the house as wife of the elder brother of the petitioner had gone to Bombay but even this request had fallen on the deaf ears of the respondent and ultimately she left on 15-6-1990 for Ajmer out of her sweet-will and this caused great mental shock and that, since 15-6-1990 respondent has never returned to the matrimonial home nor cared to write any letter. The respondent continuously i.e. right from the time of her marriage with petitioner wanted to go to her parents at Ajmer or to her sister and brother-in-law at Bombay against the wishes and desire of the petitioner and his family members. That the respondent always kept at her mind about her parental home at Ajmer and always told the petitioner to send her to Ajmer or her sister at Bombay and the respondent ultimately left the matrimonial home in June 1990 and thereafter never returned to her matrimonial home. That the petitioner had also telephonically asked the respondent and her family members to send respondent back to the matrimonial home, but on the contrary, instead of sending respondent to her matrimonial home, application claiming maintenance was filed and harassed the petitioner and his family members. That on one occasion the respondent wanted treatment for difficulty with her eye lenses and though all the facilities were available at Ahmedabad, even then respondent insisted for going to Bombay and despite the request for taking treatment at Ahmedabad the respondent insisted for going to Bombay for the reasons best known to her and only in order to avoid any quarrel and unpleasantness in the family, petitioner permitted her to visit her parents at Ajmer, but thereafter, she did not return and permanently left and deserted the petitioner with an intention not to stay & fulfill matrimonial obligation towards the petitioner.

Respondent wife in her written statement has contended that, she was not kept happy by the petitioner and she was subjected to mental & physical cruelty and lastly she was compelled to leave the matrimonial home on 15-6-1990; that the demand of dowry was made and was compelled to bring more dowry from her parents and her gold ornaments, bangles, two bracelets, two earrings, ring etc. were kept at Ahmedabad when respondent left for Ajmer on 15-6-1990 and was assured by the petitioner that he will come to Ajmer and take her back to Ahmedabad after sometime; that several telephone talks were made with the petitioner and his father however, false assurances were given that he will come and take back the respondent; that the petitioner had come to Ajmer in the

month of September for few hours only and that too for his office work at Beeawar near Ajmer and assured that he will come back again to Ajmer to take respondent back to matrimonial home and as there was no way out ultimately the respondent along with her brother had come to Ahmedabad in the month of August 1991 to the house of the petitioner for performing her matrimonial obligations, but the petitioner refused entry to the respondent in the house and said that the petitioner only require divorce from her.

It would be seen from para-19 of the petition that the petitioner permitted the respondent to visit her parental home on 15-6-1990. According to the petitioner it was because of the insistence of the respondent to stay at Ajmer and with a view to avoid quarrels and unpleasantness he permitted the respondent to visit her parental home on 15-6-1990. As seen from the pleadings as above, respondent has alleged cruelty and ill-treatment to her as the petitioner and his family members wanted more dowry. Apart from the said reason, the fact remains that the petitioner consented the respondent for her going to parental home on 15-6-1990 with her brother.

6. Petitioner has deposed at exhibit-41 that he did not demand dowry and ever since the marriage respondent was insisting for going to Ajmer and failing Ajmer, to settle at Bombay, as her sister and brother-in-law were staying at Bombay; that he tried to persuade the respondent but she was not convinced which led to quarrels and because of frequent quarrels he felt that the respondent did not want to stay with him and she appeared to be under the influence of her parental relations; that on 11-12-1989 Bhagwanbhai, brother of the respondent came to take her back and she went to Ajmer with her brother; that the respondent was informed about the death of his mother as respondent was at Ajmer at that time, and thereafter respondent returned to Ahmedabad; that the life went on well for about one month and respondent again insisted for going to Ajmer. That in March 1990 petitioner had developed piles ailment and was hospitalised for ten days and was advised rest for fifteen days at home. It is also stated that respondent stayed with the petitioner during his sickness for ten days in the hospital. That, after the sickness respondent again desired to go to Ajmer and even while petitioner was in bed rest respondent expressed her desire to go to Ajmer which led to quarrels; that she was told that after he undergoes second operation and he recovers she may go to Ajmer, but she did not agree to

that and insisted to go to Ajmer; that on 15-6-1990 respondent's elder brother came and took her to Ajmer, at that time, there was no lady member in the house as wife of the elder brother of the petitioner had gone to Bombay; that the respondent was persuaded to go after elder sister-in-law returned from Bombay, but she did not agree and went away to Ajmer; that thereafter respondent did not return to matrimonial home. That on 15-6-1990 respondent left matrimonial home of her own and that she was not driven away from matrimonial home. It is denied that in September 1990 he had gone to Ajmer. In the cross examination it has been stated that in their community there is custom of 'Dahej' ; that when respondent came to the matrimonial home after marriage, she had come with clothes & ornaments; that dowry was not demanded by the petitioner or the family members' that after the marriage respondent stayed for about nine months in the matrimonial home with the petitioner. It is denied that the respondent had handed over her ornaments to the petitioner's mother after the marriage. Petitioner had denied the suggestion about dowry being demanded from the respondent. It is stated that during the period of nine months stay after the marriage respondent had gone to Ajmer once or twice with his consent. That before 11-12-1989 she had not gone to Ajmer; that on 11-12-1989 he did not visit the parental house of respondent; that on 15-6-1990 respondent went with her brother to her parental home; that he tried to persuade her not to go but she left of her own; that when respondent left for Ajmer petitioner was in the house, he does not know particulars about which ornaments respondent had taken with her when she left him on 15-6-1990; that he never opened Bank Locker which is in the joint name with his brother.He does not remember even the locker number and the ornaments used to be kept in the cupboard and the key used to remain with the respondent. It is denied that the ornaments brought at the time of marriage were handed over to his mother and the said ornaments were kept in the Bank locker. It is denied that the ornaments are still in the custody of the petitioner and his brother. It is stated that there is a custom in their community that when death takes place in the family, then, women folk of the family have to remove their ornaments temporarily; that respondent returned from Ajmer on 7-1-1990 on the death of petitioner's mother. It is denied that despite demand by the respondent the ornaments were not returned to her, it is denied that because of the quarrel respondent left matrimonial home on 15-6-1990. He has stated that in 1994 he had gone to Ajmer to attend Family Court in connection with the proceedings under section 125 of

Cr.P.C. That, in all he had gone to Ajmer for attending said proceedings 5 to 6 times. It is denied that after 15-6-1990 the petitioner did not have the intention to keep the respondent in the matrimonial home. That no notice requiring respondent to fulfil her matrimonial obligation was served on the respondent; that after 15-6-1990 he did not try personally to contact the respondent nor did he write even a single letter after 15-6-1990 to the respondent. It is denied that after 15-6-1990 respondent had written 20 to 25 letters requesting that she be taken back to the matrimonial home; that he tried to bring back respondent to the matrimonial home after 15-6-1990 by telephone calls, but she was not willing to come back. It is denied that in the month of August respondent along with her brother had come to petitioner's house and requested to take her back in the matrimonial home, but he did not agree. It is further stated that in March 1990 he was hospitalised for undergoing surgery for piles ailment, thereafter he resumed duty in April 1990, that after June 1990 he did not undergo any surgery for piles and till today no second surgery has been undergone by him. It is stated that, even if the respondent is prepared to come back and stay with him he is not prepared to keep her. It is stated that on religious occasions and festivals like Diwali, Holi, Rakshabandhan he comes to Ahmedabad to meet his father. That his sister would also come once or twice in a month to meet her father and also on occasions. That after 15-6-1990 he tried to bring respondent back to matrimonial home but she was not willing to come and that she used to say 'No' on telephone and so he did not personally go to Ajmer to bring her back, that he did not talk to the relations of the respondent about the quarrels taking place between him and respondent, about stay/settlement at Ajmer. It is stated that his parents and family members used to treat the respondent like a family member and she was treated with affection.

7. The respondent in her evidence exhibit-56 has stated that at the time of marriage her mother & brother spent Rs.75,000/- and she came to the matrimonial home with ornaments and clothes etc.; that she had brought 4 bangles, kangan, 2 bracelets, necklace, 3 sets ear-rings, 4 rings, one chain etc. and also steel cupboard; that the petitioner and her parents-in-law used to say that the petitioner is an engineer, he has got less dowry and so respondent was treated like servant and was not even fed properly; that she was subjected to physical beatings also and was not allowed to take rest; that after the marriage she stayed for about 3 months with the

petitioner and discharged her matrimonial obligations. Thereafter on 11-12-1989 she came to Ajmer at that time petitioner did not accompany her; that on 11-12-1989 she was sent to bring dowry; that on 6-1-1990 while she was at Ajmer her mother-in-law died and upon getting telegram she came to Ahmedabad on 6-1-1990 and had brought Rs.5,000/- with her at that time and the said amount was given to the petitioner, even then she was not treated properly and she was subjected to physical beating and was asked for divorce; that in March 1990 petitioner had suffered from piles ailment and was hospitalised; that this was informed to her by her sister-in-law; at that time she had requested for allowing her to accompany her husband but she was not taken to the hospital; that during the period of hospitalisation she was in the hospital with her husband and she also attended and served him during the rest period of fifteen days at home and after bed rest of fifteen days petitioner resumed his service; that the petitioner did not tell her that he will be required to undergo second operation. That, father-in-law had written a note to her brother to come and take the petitioner; that her brother came on 1-6-1990 at that time her father-in-law had asked her brother to come on 15-6-1990; that her brother Harish again came on 15-6-1990 to Ahmedabad and along with him she was sent to Ajmer by her in-laws and asked her to bring dowry; that she was not liked by the petitioner and her in-laws; that on 15-6-1990 her husband had come to railway station to see her off; that she left all her ornaments in the matrimonial home and came to Ajmer; that thereafter nobody came to take her back; that after 15-6-1990 she had written a note to her husband to come and take her back but there was no response; that in September 1990 her husband had come to Ajmer for some office work and met her and she had requested him to take her back, but she was told that he would come again; that in August 1991 she and her brother Harish came to Ahmedabad and met her father-in-law and the petitioner, but they told that they do not want to keep her, she was not liked and they want divorce.

In the cross-examination it is stated that no notice has been served by the petitioner requiring her to fulfil marital obligations and only notice dated 30-10-1993 was given asking for divorce. That, in reply to the notice she had sent a note saying that she does not want divorce and she be taken back, but thereafter petitioner did not come to take her. It is stated by her that she did not state in her application for maintenance that when she came at the time of death of her mother-in-law she had brought Rs.5000/-. That on

30-5-1990 her brother had come to take her to Ajmer but at that time her father in law said that it is not convenient to send her, whereupon her brother again came in June 1990 to take her. That in June 1990 when she went with her brother at that time her husband had come to the railway station to see her off; that in June 1990 when she came to Ajmer she had brought with her some clothes and few ornaments. It is denied that she was quarrelling with her husband and insisting to settle at Ajmer. It is denied that she was not sent to Ajmer for bringing dowry. It is denied that after her husband underwent operation for piles she was insisting and was in a hurry to go to Ajmer. It is stated that she cannot say that in her community for an engineer or doctor more dowry is required to be given. That at the time of marriage petitioner had some luecoderma spots.; that her husband used to tell her that he does not like her and that she should go away.

8. It will be seen from the above evidence that after the marriage respondent wife continuously stayed in the matrimonial home with the petitioner and other family members for a period of three months. According to the petitioner, they stayed together as husband & wife in all for nine months. For the first time after marriage she came to Ajmer after three months and when she had stayed at Ajmer for couple of days her mother in law expired and telegram to that effect was sent at Ajmer, whereupon the respondent returned to the matrimonial home on 6-1-1990. In the month of March 1990 petitioner had developed piles which required hospitalisation for ten days and that the petitioner was required to undergo surgery. The evidence on record disclosed that during the period of ten days hospitalisation respondent remained in the hospital with the petitioner and served him. Petitioner resumed his work in April 1990 after bed rest at home for fifteen days. It is disclosed from the evidence that, during this entire period respondent attended and served her husband. According to the petitioner/ husband, respondent/wife all the while was insisting for going to Ajmer. It may be appreciated that, for the first time after the marriage in September she had gone to Ajmer in December 1989. Her stay at Ajmer was curtailed because of the death of mother of the petitioner and upon getting the telegram respondent returned to the matrimonial home on 6-1-1990. It is not the say of the petitioner that subsequent to the after death ceremonies respondent again went to Ajmer; that in March 1990 petitioner was hospitalised for piles surgery. Thus from 6-1-1990 till petitioner resumed his work in April 1990 respondent was in the matrimonial home. As far as petitioner going to

Ajmer on 15-6-1990 is concerned, respondent's evidence discloses that petitioner's father had written a letter to take respondent to Ajmer whereupon on 30-5-1990 her brother had come to take her to Ajmer but the petitioner's father sent him back saying that it was not convenient to send the respondent to Ajmer at that time and that he should come on 15-6-1990. The brother again came on 15-6-1990. As observed earlier petitioner also says that on 15-6-1990 he consented the respondent to go to Ajmer. According to the respondent petitioner had come to railway station to see her off when she left for Ajmer. In the cross examination of the respondent no suggestion is made to the effect that the petitioner did not see her off at railway station when she went with her brother on 15-6-1990. According to the respondent she was assured by the petitioner that he would come after some time and bring her back. According to the petitioner she did not bring all her ornaments with her and when she came from Ahmedabad she had come with few clothes and few ornaments. It may be appreciated that a married lady in Indian society daily wears gold bangles, Mangal Sutra, ring and earrings. It may also be appreciated that even according to the petitioner he did not write even a single letter to the respondent to come back to the matrimonial home and what he says is that he contacted on telephone asking respondent to return to matrimonial home but the respondent used to say no, and the only written communication even according to the petitioner is the notice dated 30-10-1993 demanding divorce from the respondent. According to the respondent, she was not treated well in her matrimonial home as the petitioner and her in-laws were insisting for more dowry; that in December 1989 she was sent to Ajmer for bringing more dowry. Even during the entire period from 15-6-1990 petitioner did not visit respondent or her in-laws at Ajmer. As per the evidence, right from 10-9-1989 till 15-6-1990 the respondent visited Ajmer only on one occasion, i.e. in December 1989 and after her stay for few days at Ajmer she was required to rush back to Ahmedabad on account of the death of her mother in-law. If the respondent was insisting for going frequently to Ajmer then in that case she would not have allowed her brother to go back who had come on 30-5-1990 and she would have insisted to go with him on 30-5-1990, but the petitioner does not say a word at that time and as father in law said it was not convenient at that time to send the respondent to Ajmer and she abided by it and her brother was called again after fifteen days and on 15-6-1990 she went to Ajmer with her brother with the consent of the petitioner as observed above. It is pertinent to note that, if quarrels were taking place

between petitioner and the respondent on account of insistence of the respondent to settle/stay at Ajmer or Bombay then the inmates in the family would certain know about the quarrels taking place between husband and wife when all of them were staying under the same roof. Initially such things may not be known to other members in the family, but if frequent quarrels were taking place between husband & wife and was causing tension to the petitioner as stated by him and with a view to avoid quarrels and unpleasantness the petitioner agreed to send her to Ajmer on 15-6-1990 as he says and,if that be so, when the situation had reached at a stage whereby petitioner was obliged to permit the respondent to leave the matrimonial home, then in that case, the other family members would certainly know about the discord between the husband and wife. Interestingly enough not a single family member including the petitioner's father has come forward and deposed, saying that the respondent was insisting to settle at Ajmer or at Bombay and that she was frequently asking for going to Ajmer which led to the quarrels between the spouses. Had this been the fact, then, it would be within the knowledge of the other inmates of the house and they can certainly depose about the insistence if any, on the part of the respondent for settlement at Ajmer or Bombay or about her insistence for frequently going to Ajmer, but there is no evidence to this effect supporting the say of the petitioner on this score.

9. As seen above the evidence discloses that the petitioner did not undergo second operation for piles ailment. According to the respondent the doctor did not feel that petitioner will have to undergo second operation. One operation was performed for piles in March 1990 and after fifteen days bed rest at home the petitioner resumed duty,meaning thereby, that, he had fully recovered from the ailment of piles. The petitioner does not make any grievance about the behaviour of the respondent during the period of hospitalisation and the subsequent bed rest. Because of the demise of the mother-in-law she rushed back to Ahmedabad taking it as a call of duty to the family. In our view such a lady cannot be faulted with and it would be quite natural for a lady to express her desire to go and see her brothers especially widow mother at Ajmer after the petitioner had fully recovered from piles ailment. The very fact that the brother had come on 30-5-1990 to Ahmedabad to take respondent to Ajmer and he was sent back saying it was not convenient to send to the petitioner, the brother again came on 15-6-1990, on the contrary would go to show that, the respondent was

cooperative and went to her parental home only with the consent of the petitioner and other family members, particularly father-in-law on 15-6-1990. As seen above as per the respondent, petitioner had gone to see off her at railway station. Now, if the respondent was going to Ajmer, on 15-6-1990 against the wish of the husband, he would not have gone to see her off at the railway station. All that can be said is that the respondent might have expressed her desire to go to Ajmer and her brother in that connection came to Ahmedabad on 30-5-1990 but was sent back and called again on 15-6-1990 and that was all with the consent of the petitioner, and respondent going with her brother on 15-6-1990 can be clearly inferred from the circumstances that it was with the consent of the petitioner coupled with having regard to to the subsequent conduct of the petitioner that after 15-6-1990 he did not write single letter to the respondent to return to the matrimonial home and especially when according to the respondent, the petitioner on telephonic talk did not agree to her returning to the matrimonial home. If the respondent had left against the wish of the petitioner and the petitioner really wanted the respondent to come back to matrimonial home and perform her marital obligations his conduct would have been different. It may be that the petitioner was waiting for the opportunity to get rid of the respondent and got the opportunity on 15-6-1990. In our opinion not replying to the notice dated 30-10-1993 by respondent itself cannot lead to the inference that, respondent was not willing to go back to the matrimonial home especially under the circumstances that it was with the consent of the petitioner she came to Ajmer on 15-6-1990 and the petitioner thereafter did not make even a single attempt to bring her back to the matrimonial home. According to the petitioner in the month of August respondent along with her brother had come to Ahmedabad and met the petitioner and family members and, at that time petitioner refused entry to the respondent in the matrimonial home, saying that he wanted divorce. The respondent has not been cross examined on this point by the petitioner disputing her visit to Ahmedabad with her brother in August 1991 and attempted re-entry in the matrimonial home. This is suggestive of petitioner's attitude towards the respondent.

10. It need hardly be said, besides physical separation in company it has also to be seen that the offending spouse has left the matrimonial home forsaking matrimonial ties with the intention not to return to matrimonial home. In other words there must be animus deserendi on the part of the dissenting spouse.

In the case of SAVITRI PANDEY V. PREM CHANDRA PANDEY, reported in 2002 (2) G.L.R. pg. 1369, Hon'ble Supreme Court has observed thus :-

> "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case.
>
> To prove desertion in matrimonial matter, it is not always necessary that one of the spouses should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case. "

11. According to the respondent, at the time of marriage she had brought saries, gold ornaments, steel cupboard etc. According to her at the time of death of her mother-in-law, as per custom in the community women folk in the house removes their ornaments as a mark of mourning and all the ornaments were kept in the locker which was in Bank of India, Ahmedabad, and that these ornaments remained in the locker and never returned to her; that when she left on 15-6-1990 she returned with few clothes and few ornaments, meaning thereby, she left her remaining ornaments, clothes etc. and the steel

cupboard in the matrimonial home. If she had the intention of not returning to the matrimonial home forsaking the marriage permanently then she would have insisted for taking remaining ornaments and clothes etc. when she left the matrimonial home. But the fact that she left most of her clothes and ornaments in the matrimonial home would be suggestive of the fact that, her going to Ajmer on 15-6-1990 with her brother was a normal/temporary visit to the parental home without any intention of forsaking marriage permanently, or with an intention not to return to matrimonial home permanently. The very fact that she attempted re-entry in the matrimonial home in August 1991 with her brother when she was denied re-entry by husband and father-in-law would also be suggestive of the fact that, when the petitioner did not come to take her back till August 1991 she made an attempt to return to matrimonial home show that she had the desire to return to the matrimonial home and she did not have the intention of forsaking the marriage permanently when she left on 15-6-1990 or even thereafter. It may also be appreciated that the application under Sectin 125 of Cr.P.C. must have been filed in 1994 being Misc. Criminal Application No. 22 of 1994 before the Criminal Court at Ajmer claiming maintenance and that,the spouses parted company in June 1990, i.e. after 3 1/2 years of the spouses parted company. Admittedly petitioner has not written even a single letter requiring the respondent to return to the matrimonial home nor did he personally contact respondent during this period. Respondent had lost her father before marriage, she has a widowed mother and brothers. If nothing is heard from the husband for taking wife back to the matrimonial home for 3 1/2 years, how long the wife can be a dependent on brothers. Simply because the wife resorts to proceedings under Sectin 125 of Cr.P.C. claiming maintenance, that cannot be an act on the part of the wife indicating intention not to return to the matrimonial home. It appears from the evidence on record that it is the petitioner who wanted the respondent not to return to the matrimonial home and taking advantage of the fact that the respondent went to Ajmer, though with the permission of the petitioner, with her brother, the petitioner did not want the respondent back in the matrimonial home and taking advantage of the respondent's stay at her parents place from 15-6-1990 the petitioner comes forward with the contention that it is the respondent who has deserted the petitioner. It appears that while permitting the respondent to go to Ajmer on 15-6-1990, the petitioner had no intention to call her back, which is suggested by his subsequent conducted as pointed out above. Under the circumstances we are of the

view that, the respondent going to her parental home on 15-6-1990 with her brother cannot be regarded as respondent having deserted the petitioner much less with the intention of permanently forsaking the marriage with an intention not to return to the matrimonial home. It appears that, in fact, it is the petitioner who created a situation by sending the respondent to Ajmer with her brother on 15-6-1990 and thereafter trying to take advantage of the separation in company of the spouses.

12. Coming to the other ground for dissolution of marriage pressed into service by the petitioner, namely respondent wife having allegedly inflicted cruelty on the petitioner, it will be seen that in the petition it has been stated by the petitioner that the respondent did not want to settle at Ahmedabad and therefore she started quarrelling with the petitioner and his family members for one reason or the other. Thus from the initial days of marriage respondent mis-behaved and instead of treating the house of her in-laws as her own house, she always insisted for going to Ajmer or Bombay as she was completely under the influence of her mother, brothers, sister and brother-in-law. Thus respondent quarrelling with the petitioner and the family members with the above desire is the cruelty by the respondent, according to the petitioner. As observed earlier, no family member comes forward saying that the respondent was insisting for settling at Ajmer or Bombay and therefore she was quarrelling with the petitioner and family members for one reason or the other and right from the beginning respondent misbehaved and did not treat her matrimonial home as her home. The very fact that the respondent upon hearing the news about the demise of her mother-in-law, curtailing her stay at Ajmer rushed back to Ahmedabad on 6-1-1990 would be suggestive of the fact that the respondent treated the inmates of the matrimonial home as her own and in the time of calamity which had befallen on the family she comes back to Ahmedabad to remain with the family. Now, if the respondent was quarrelling with the petitioner and the inmates of the house and insisting to stay either at Ajmer or Bombay then in that case she would not have immediately rushed back to Ahmedabad and, if at all she wanted to come for show, then, on receiving the telegram of the demise of mother-in-law she would not have immediately rushed back to Ahmedabad. This proves that the respondent must not be picking up quarrels on the issue of stay at Ajmer or Bombay. It may also be appreciated that the petitioner also sent telegram immediately on the death of mother which had occurred on 5-1-1990. Al these would go to show that atleast the respondent had not give any cause to the petitioner or

his family members. If the respondent was a quarrelsome lady and used to pick up quarrels with everybody in the house soon after the marriage then the petitioner would be slow in informing about the death of the mother.

13. It may also be appreciated that the evidence disclosed that the petitioner was hospitalised for ten days as he underwent operation for piles and the respondent remained with the petitioner in the hospital, and attended & served him not only during hospitalisation but also during fifteen days bed rest period at their house and the petitioner resumed his duties in April 1990. It is not the say of the petitioner that till 15-6-1990 he was advised second surgery and that he asked the respondent not to go to Ajmer till he undergo second operation. It has come in evidence that petitioner did not undergo second operation for piles. Respondent left the matrimonial home on 15-6-1990, till then, i.e. after first hospitalisation, petitioner was not hospitalised again nor second surgery was fixed or told her about the same and the petitioner resumed duty in April 1990. For the whole of April and May the petitioner was attending his work. Thus there is no question of respondent going to Ajmer on 15-6-1990 ignoring health of the petitioner.

The mental cruelty that the respondent wife allegedly inflicted on the petitioner has to be appreciated in light of the evidence that right from 6-1-1990 she was in the matrimonial home and stayed as daughter-in-law observing mourning, not putting ornaments according to the custom on account of demise of mother-in-law, attending the ailing husband, remaining in the hospital with the husband in the hospital during the period of hospitalisation and serving him not only during the hospitalisation but also during bed rest period at residence, and when the husband not required to undergo any further treatment or surgery and leading normal life attending his duties in the month of April, May and June till 15-6-1990, and if after the husband becomes normal & attending duty for over two months and if the wife express the wish to visit parental home as she had to curtail her visit on previous occasion, can it be said that the petitioner has been subjected or treated with mental cruelty. The answer has to be in the negative.

In the case of Savitri Pandey Vs. Prem Chandra Pandey (supra) it has been observed by the Supreme Court that, treating the petitioner with cruelty is a ground for divorce under Section 13 (1) (ia) of the Hindu Marriage Act. Cruelty has not been defined under the Act, but in relation to matrimonial matters it is

contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

14. It has been averred in the petition and also deposed in evidence that because the respondent deserted the petitioner, petitioner could not enjoy matrimonial life and thereby respondent has inflicted cruelty on the petitioner. It may be appreciated that separation in company between spouses has been in the circumstances pointed out above. In case of physical separation in company, the absence of cohabitation/want of marital relations with the respondent is the resultant effect because of the physical separation in company of the spouses. It is not the case of the petitioner that before 15-6-1990 respondent refused access to the petitioner for cohabitation/sexual intercourse and thereby she treated the petitioner with cruelty. Under the circumstances the cruelty alleged on this ground does not deserve any consideration.

15. Mr. S.M. Shah, learned senior advocate for the petitioner husband has placed reliance on the decision in the case of AMINAKHATUN WD/O MAHMUDUSMAN GULAMRASUL & ORS V. FAKRUSHA BISMILLAHSHAH FAKIR & ANR, reported in XXIII (1) G.L.R. pg. 728 (D.B.) and contended that, a fact finding body's conclusion on factual aspects ordinarily does not call for any interference with, unless there is wrong application of the principle or the facts are misread or not read. There can be no disagreement with this proposition of law. In the instant case interference with finding of fact is called for having regard to the evidence on record on animus discerendi on

the part of the respondent. As observed above the evidence on record does not establish desertion by the respondent much less with animus deserendi on her part. And also looking to the nature of cruelty alleged to have been inflicted by the respondent in light of the evidence and the cruelty alleged is the one contemplated under Section 13 (1) (ia) of the Act as a conduct of such type of cruelty which endangered living of the petitioner with the respondent and the cruelty alleged is dangerous to limb, life or health of the petitioner. The evidence fall short of cruelty which postulates a treatment of the petitioner that such cruelty would cause reasonable apprehension in him or his mind that it would be harmful or injurious for the petitioner to live with the respondent. Even assuming that respondent insisted or desired to stay at Ajmer or Bombay, it would be nothing but ordinary wear & tear of matrimonial life and desire/ insistence on the part of the respondent, assuming it to be so, cannot be decided on the basis of the sensitivity of the petitioner and the same has to be adjudged on the basis of the entire conduct of the respondent. For all these reasons, we are of the opinion that, the finding of fact on desertion as well as cruelty on the part of respondent wife arrived at by the trial Court calls for interference.

16. Mr. J.G. Asrani, learned advocate for the respondent wife has submitted that an amount of Rs.1,000/- p.m. under section 24 of the Act by way of pendente lite maintenance is very much on the lower side, considering the income of the husband. We are not inclined to interfere with the said order, with a view not to add further bitterness and adversely affect the scope of reunion between the spouses, we leave the order of pendente lite under Section 24 of the Hindu Marriage Act as it is.

17. Learned trial Judge has awarded Rs.2,50,000/- by way of lump sum permanent alimony under Section 25 of the Act. Since we are of the view that the petitioner husband has not been able to establish grounds contemplated under Section 13 (1) (ia) - cruelty or Section 13 (1) (ib) desertion by the respondent, and as we are inclined to set aside the decree dissolving the marriage between petitioner and the respondent, there is no question of awarding any permanent alimony under Sectin 25 of the Act, and therefore, the order passed under Section 25 of the Act also would be liable to be set aside.

18. In the result the appeal is allowed. The decree

dissolving the marriage between the appellant wife/original respondent and respondent husband/original petitioner solemnised on 10-9-1989 at Ahmedabad, passed in Family Suit No. 73 of 2000 (Old H.M. Petition No. 449 of 1993 of City Civil Court, Ahmedabad), by the Family Court, Ahmedabad, is hereby set aside. Consequently, order under Section 25 of the Hindu Marriage Act awarding lump sum permanent alimony of Rs.2,50,000/- is also set aside. No order as to costs.

Dt: 20-09-2002 (N.G. Nandi, J)

(H.K. Rathod,J)

/vgn